

## COOPERATIVE RESEARCH

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Acquisition reform can occur in many different ways. The recent reform efforts, such as the Federal Acquisition Streamlining Act, are only a part of the revolution that has been occurring in the federal research and development community. In the past decade or so Congress has been cumulatively granting new authorities to the defense laboratories which provide new ways for the federal laboratories to interact with one another, industry and academia. Defense laboratories now clearly have the authority to enter into: (1) cooperative research and development agreements; (2) grants; (3) cooperative agreements; (4) education partnership agreements; (5) "other transactions"; and (6) sales of material, information and services. In many cases, the new authorities can be exercised without competition, have been delegated down to a working level and contain broad substantive authority, often with little or no regulatory guidance. The impact of these new authorities on how the research and development community conducts business has been gradual but pervasive, requiring flexibility on the part of the legal community in helping form the new relationships flowing from the exercise of these new authorities. With the merger of the research and development community into MEDCOM and the concomitant increase in interfaces, a source for information on these new authorities is needed. This memorandum is intended to be an initial source for legal research on these new authorities, and related law, for these new relationships.

### I. Assistance Agreements (grants, cooperative agreements and "other transactions")

The Department of Defense (DOD) has had the authority to enter into research grants, (and of course, procurement contracts), for many decades; however, only relatively recently has Congress expressly provided the authority to enter into cooperative agreements under 10 U.S.C. § 2358. A fundamental statute to be cognizant of in determining whether a contract, grant or cooperative agreement is the appropriate mechanism can be found at 31 U.S.C. § 6301, *et. seq.* Congress has also

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provided DOD with the authority to enter into so-called "other transactions," the authority for these agreements is found at 10 U.S.C. § 2371.

The DOD has provided regulatory guidance in exercising these authorities in the so-called "DODGARS," DOD Grant and Agreement Regulations, DOD 3210.6-R.

The Federal Grant and Cooperative Agreement Act, 31 U.S.C. § 6301, *et seq.*, sets the criteria for when to use a contract, grant or cooperative agreement. We should use a contract when we are acquiring something for the "direct benefit" of the Government. We should use a grant when we want to provide support for a "public purpose." We should use a cooperative agreement when we want to provide support for a public purpose and we plan to be "substantially involved" in carrying out the activity contemplated under the cooperative agreement. Both grants and cooperative agreements are commonly referred to as "assistance" agreements. We may use "other transactions" only when these other mechanisms are "not feasible or appropriate," according to 10 U.S.C. § 2371.

One curious point which must be noted is that cooperative agreements and "other transactions," unlike grants and contracts, do not have a statutory requirement for competition. The statutory requirement for competition in awarding contracts is found at 10 U.S.C. § 2304. The statutory requirement for competition in awarding grants is found at 10 U.S.C. § 2361. Nevertheless, all assistance agreements are competed as a matter of policy. Generally, competition is achieved by a process known as a "Broad Agency Announcement" (BAA). BAAs are authorized and scantily covered by FAR Part 6.102 (d)(2). There are a few reported Comptroller General cases involving "peer review" under BAAs. The first reported case happened to involve the United States Army Medical Research and Development Command, the predecessor to U.S. Army Medical Research and Materiel Command, and can be found at Matter of: The Comedica Corporation--Reconsideration, June 24, 1987, B-225752.2, 87-1 CPD P 628, 1987 WL 102532 (C.G.).

## II. Cooperative Research and Development Agreements (CRDAs)

Cooperative Research and Development Agreements allow commanders of laboratories to collaborate with just about any entity on a "specified research and development effort." During

the conduct of a CRDA a laboratory may accept personnel, funds, equipment or other resources from a collaborating party and may give to the collaborating party anything except funds. The statutory authority for CRDAs is at 15 U.S.C. § 3710a. CRDAs are the foundation of the Army's domestic technology transfer program and provide a substantial mechanism for interacting with corporations (both for profit and nonprofit), universities and colleges and just about any other entity. Of significance to the MEDCENS within MEDCOM is the fact that the clinical investigation program has been delegated the authority to enter into CRDAs and may use this mechanism for clinical investigation projects.

There is no competition requirement for CRDAs; however, there is a statutory preference for small businesses and for collaborators who agree to make products arising out of CRDAs substantially in the United States. There are only three reported cases involving CRDAs: Chem Service, Inc. v. Environmental Monitoring Systems Laboratory-Cincinnati of U.S. E.P.A., 12 F.3d 1256, 62 USLW 2429, 39 Cont.Cas.Fed. (CCH) P 76, 617 (3<sup>rd</sup> Cir. (Pa.), December 27, 1993) (NO. 93-1196); DeLorme Pub. Co., Inc. v. National Oceanic and Atmospheric Admin. of U.S. Dept. of Commerce, 917 F.Supp. 867, 64 USLW 2675 (D.Me., March 12, 1996) (NO. CIV. 95-94-P-H); and Rose v. Associated Universities, Inc., 1994 WL 167974 (S.D.N.Y., April 29, 1994) (NO. 93 CIV. 5872 (LMM)). The Army has two regulations which provide guidance on CRDAs: Army Regulation 27-60 and Army Regulation 70-57. Although there is no legal requirement for competition, the best practice which is emerging is to announce publicly significant (those involving substantial resources) collaborative projects and compete them. The best emerging guiding principle in selecting CRDA partners is ensuring the selection is rational. This is in contrast to the so-called "fairness doctrine" underlying traditional procurement selection.

### III. Education Partnership Agreements

In 1990 Congress granted defense laboratories the authority to enter into Education Partnership Agreements (EPAs). The statutory authority for these agreements is found at 10 U.S.C. § 2194. Under EPAs, laboratories may: (1) loan or transfer laboratory equipment to an educational institution; (2) make laboratory personnel available for teaching; (3) collaborate on research projects with educational institution personnel; and

(4) develop programs where students receive academic credit for work on laboratory research projects. There is no regulation per se regarding EPAs, but the authority has been delegated to commanders/directors of laboratories.

There is no competition requirement for entering into EPAs; however, there is a preference for developing agreements with historically Black colleges or universities and educational institutions providing assistance to women and other minorities who traditionally are involved in engineering and science professions in disproportionate numbers.

#### IV. Sales Under 2539b

In 1993 Congress passed into law 10 U.S.C. § 2539b granting DOD the authority to: (1) sell, rent or give samples, drawings, manufacturing or other information; (2) sell, rent or lend government or materials for use in independent research and development programs or in demonstrations to a friendly foreign government; and (3) make available the services of any government laboratory, center, range, or other testing facility for the testing of materials, equipment, models, computer software, and other items. Again, there is no regulation per se for 2539b transactions; however, the authority has been delegated down through acquisition channels to Heads of Contracting Authority, except that transactions involving payment for services must be coordinated with the DOD Comptroller.

## REFERENCES:

### 1. FEDERAL STATUTES/LAWS:

a. Title 10, United States Code, Section 2194 (Education Partnerships).

b. Title 10, United States Code, Section 2304 (Contracts: Competition Requirements).

c. Title 10, United States Code, Section 2358 (Research and Development Projects).

d. Title 10, United States Code, Section 2361 (Award of Grants and Contracts to Colleges and Universities: Requirement of Competition).

e. Title 10, United States Code, Section 2371 (Research Projects: Transactions Other Than Contracts and Grants).

f. Title 10, United States Code, Section 2539b (Availability of Samples, Drawings, Information, Equipment, Materials, and Certain Services).

g. Title 15, United States Code, Section 3710a (Cooperative Research and Development Agreements).

h. Title 31, United States Code, Section 6301 (Using Procurement Contracts and Grant and Cooperative Agreements).

### 2. DOD REGULATIONS:

DOD 3210.6-R, Grant and Agreement Regulation

### 3. ARMY REGULATIONS:

a. AR 27-60, Legal Services, Intellectual Property.

b. AR 70-57, Research, Development, and Acquisition, Military-Civilian Technology Transfer.

